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No. 91-597

In the Supreme Court of the United States

OCTOBER TERM, 1991

HOUSTON BUILDING SERVICE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly found that petitioner was a successor employer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 936 F.2d 178. The decision and order of the National Labor Relations Board (Pet. App. 7a-43a) is reported at 296 N.L.R.B. No. 101.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1991. The petition for a writ of certiorari was filed on September 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, the Unlicensed Division of District No. 1, MEBA/NMU, AFL-CIO (Union) became the recognized collective bargaining representative of a unit of approximately 30 custodial services employees working for Nash Janitorial Services, Inc. (Nash). Nash provided janitorial services for the General Services Administration (GSA) at three federal buildings in Austin, Texas. Pet. App. 12a-14a. The service contract was periodically rebid. Between 1980 and 1987, five successive employers assumed responsibility for providing janitorial services for GSA. Each hired the employees of its predecessor and maintained a collective bargaining relationship with the Union. *Id.* at 14a-15a. The last contractor prior to petitioner, Housekeepers Maintenance Service and Supply, Inc. (Housekeepers), had a collective bargaining agreement with the Union effective August 1986 through October 1989. *Id.* at 15a.

In 1987, GSA solicited bids for the custodial contract. Pet. App. 15a. Petitioner was the successful bidder. *Id.* at 18a. Before winning the bid, a representative of petitioner solicited and received from the Union the current collective bargaining agreement and an employee seniority list. *Id.* at 15a-16a. Petitioner's president, Jason Yoo, also discussed with Eugene Darby, the janitorial services manager for Housekeepers, the possibility of retaining Darby if petitioner were awarded the contract. *Id.* at 16a. Yoo mentioned to Darby that he desired to hire new employees. Darby told Yoo that it could take up to a month to obtain the security clearances needed.[1] Yoo

[1] To be employed in the federal buildings in Austin, each employee required a security clearance. Pet. App. 16a n.8.

believed that the clearances could be obtained more quickly. *Id.* at 16a & n.8.

Petitioner's contract obligations commenced on December 1, 1987. On November 25, petitioner made conditional job offers to 18 individuals, not members of the Housekeepers workforce, to work at the federal buildings, contingent on their obtaining the required security clearances. Some of those applicants failed to receive clearances and were never hired by petitioner to work at the federal buildings. Pet. App. 17a-18a & n.11. On December 1, when petitioner began performing the janitorial services contract, its entire rank-and-file workforce consisted of the 30 former Housekeepers employees. Darby, as well as two other former Housekeepers supervisors, also were hired by petitioner. *Id.* at 19a.

On December 2 or 3, Darby distributed job application forms to the former Housekeepers employees, as well as union authorization forms. The employees completed and returned the forms. Pet. App. 19a. Petitioner began to add new employees as they received security clearances. The former Housekeepers employees, however, constituted a majority of its workforce.[2] *Id.* at 30a-31a.

On December 9, petitioner refused the Union's request for recognition and notified GSA that it intended to subcontract its custodial work. Pet. App.

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[2] One new employee and two new supervisors began working on December 3 and 4. During the week of December 6 through 12, petitioner's maximum employee complement included the original workforce of 30 employees and 3 holdover supervisors, plus 10 new employees and 2 new supervisors. During the week of December 14 through 19, its employee complement included 16 of the original unit employees, 2 holdover supervisors, 11 new employees, and 2 new supervisors. Pet. App. 23a-24a, 30a-31a.

21a-22a. Thereafter, petitioner unilaterally reduced working hours and terminated all of the night shift employees. *Id.* at 23a. Petitioner never bargained with the Union and failed to make contributions to employee benefit funds. *Id.* at 24a.

2. The Union filed unfair labor practice charges against petitioner. The Board, upholding the decision of the administrative law judge (ALJ), found that petitioner was a successor to Housekeepers and accordingly obligated to recognize and bargain with the Union. Pet. App. 9a, 29a. The ALJ found that there was "substantial continuity" between petitioner and Housekeepers. *Id.* at 28a. The ALJ explained that petitioner's "operations and functions" were the same as those of its predecessor. *Id.* at 29a. On commencing work, the ALJ noted, petitioner "utilized the exact same workforce performing the same jobs under the same working conditions and with the same supervisors that had been utilized by [Housekeepers]." *Id.* at 30a. The ALJ also observed that the services performed by the employees continued without interruption. *Ibid.*

The ALJ further found that by December 9, when the Union requested recognition, petitioner "employed a full workforce with all job classifications filled." Pet. App. 31a. The ALJ and the Board rejected petitioner's assertion that the Housekeepers' employees hired by petitioner were temporary employees. The ALJ and the Board noted that the employees were never told they were temporary. *Id.* at 8a n.2, 32a. The ALJ further noted that there was "no known definite or contemplated date for their termination." *Id.* at 32a.

Based on those findings, the Board concluded that petitioner violated Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5)

and (1), by refusing to recognize and bargain with the Union and by making unilateral changes in working conditions.[3] Pet. App. 9a, 35a.

3. The court of appeals enforced the Board's order. Pet. App. 6a. The court concluded that the Board's finding that petitioner was a successor to Housekeepers was supported by substantial evidence. Citing *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987), and *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972), the court noted that the Board properly takes into account "the totality of the circumstances" in determining whether there has been "substantial continuity" between the old and new employers. Pet. App. 3a-4a. The court observed that one of the "most significant" factors in determining successorship "is the overlap of workforces between the two entities." *Id.* at 4a. The court rejected petitioner's assertion that, because it acquired no assets from Housekeepers, there could be no finding of successorship. The court explained that "[t]ransfer of ownership of assets * * * is only one factor" to be considered in determining whether "the second corporation basically has continued the business and workforce of the first." *Id.* at 6a n.2. On the facts of this case, the court of appeals observed that, when the Union made its bargaining demand, all of petitioner's employees "were former Housekeepers workers who were performing identical work to that which they had done under Housekeepers. The

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[3] Section 8(a)(5), 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(a)(1), 29 U.S.C. 158(a)(1), makes it unfair labor practice for an employer to "restrain, coerce, or interfere with" the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157.

working conditions, production process, and customers remained unchanged." *Id.* at 5a.

The court of appeals rejected petitioner's assertion that under the Board's ruling, petitioner was precluded from hiring its own permanent workforce. The court explained that, if petitioner had desired to hire its own employees and to treat the original unit employees as a temporary workforce, it could have simply told those employees that their status was temporary. Instead, the court noted, petitioner gave the employees job applications and union cards, thus misleading the employees into believing that their status was permanent. Petitioner "did nothing to combat the impression that any reasonable employee would have in these circumstances that the 'new' job merely was a continuation of the old." *Id.* at 5a-6a.

ARGUMENT

1. Petitioner contends (Pet. 7-8) that the Board misapplied the successorship doctrine in this case by finding that petitioner was a successor firm even though it did not acquire the assets of its predecessor. That contention is foreclosed by *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972).

In *Burns*, the Court sustained the Board's determination that Burns, as the successful bidder to a contract previously performed by Wackenhut Corporation to furnish guard services, was required to bargain with the union that had represented Wackenhut's employees. 406 U.S. at 277-281.[4] The Court

[4] The Court rejected the Board's position that the successor was required to assume the predecessor's collective agreement. 406 U.S. at 291. The Court held instead that a successor who retains the predecessor's workforce is required to consult with the collective bargaining representative of those em-

concluded that imposing a bargaining obligation is appropriate when the new employer maintains substantial continuity in the operation of its predecessor's business so that "the bargaining unit remains unchanged" and "a majority of employees after the change of ownership or management were employed by the preceding employer." *Id.* at 279, 281. The dissent in *Burns* argued that the successorship doctrine should not apply since there had been no transfer of assets. 406 U.S. at 296-310 (Rehnquist, J., dissenting). The Court, however, refused to accept that principle. Instead the Court quoted with approval the court of appeals' finding that "[a]ll of the important factors which the Board has used and the courts have approved are present in the instant case: 'continuation of the same types of product lines, departmental organization, employee identity and job functions.' " *Id.* at 280 n.4.[5]

Petitioner does not dispute that, under the Court's decision in *Burns*, a finding of successorship is warranted in this case; it simply urges (Pet. 8-9) adoption of the dissenters' view in *Burns* that the successorship doctrine should not apply in the absence of some transfer of assets. Petitioner, however, has advanced no reason why the Court should depart from the doctrine of *stare decisis*. *Burns* has been settled

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ployees before changing their terms and conditions of employment. *Id.* at 294-295.

[5] The Court added that the Board had found that both Burns and Wackenhut "performed the identical services at the same facility; although Burns used its own supervisors, their functions and responsibilities were similar to those performed by their predecessors; and finally * * * Burns commenced performance of the contract with 27 former Wackenhut employees out of its total complement of 42." 406 U.S. at 280 n.4.

law for nearly twenty years, and its reasoning was recently reaffirmed and applied by this Court in *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 36-41 (1987). There is no justification for revisiting that statutory issue. See *Hilton* v. *South Carolina Public Railways Comm'n*, No. 90-848 (Dec. 16, 1991), slip op. 4 ("Time and again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.' * * * Adherence to precedent promotes stability, predictability, and respect for the judicial authority."); *California* v. *FERC*, 110 S. Ct. 2024 (1990); *Square D Co.* v. *Niagara Frontier Traffic Bureau, Inc.*, 476 U.S. 409 (1986).

2. Nor is there merit to petitioner's suggestion (Pet. 11) that *Fall River* requires the Board to "focus on whether the new company has 'acquired substantial assets of its predecessor and continued, without interruption or substantial changes, the predecessor's business operations.'" On the contrary; the Court in *Fall River* reiterated that, "[i]f the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of [Section] 8(a)(5) is activated." 482 U.S. at 41. The Court went on to state that *Burns* had approved "the approach taken by the Board and accepted by courts with respect to determining whether a new company was indeed the successor to the old," and that this approach "is primarily factual in nature and is based upon the totality of the circumstances of a given situation." *Id.* at 43. "Under this approach, the Board examines a number of factors," such as "whether the business of both employers is essentially the same" and "whether the employees of the new company are doing the same jobs in the same

working conditions under the same supervisors." *Ibid.*

While the Court in *Fall River* noted that the Board will also examine "whether the new company has 'acquired substantial assets of its predecessor,'" 482 U.S. at 43, quoting *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 184 (1973), it was not suggesting that this factor is essential to a finding of successorship. Rather, the statement merely reflects the fact that the acquisition of assets, which occurred in *Fall River* and *Golden State*, is a factor to be considered in determining whether there is "substantial continuity" between the old company and the new one. *Fall River* stated, however, that the essential question is whether "those employees who have been retained will understandably view their job situations as essentially unaltered." 482 U.S. at 43.

Here, as in *Burns*, while there was no assets acquisition, the other indica of continuity were sufficient to justify the Board in concluding that the employees would "view their job situations as essentially unaltered." As the court of appeals noted, petitioner "chose to rehire a workforce that had grown accustomed to new owners adopting the collective bargaining arrangements of former employers"; petitioner "not only rehired those same workers, but did so in a manner which would indicate that the same practice was continuing"; and the "operations * * * remain[ed] essentially the same after the transfer of ownership." Pet. App. 6a. The court of appeals' determination that the Board's order is supported by substantial evidence warrants no review here. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[6]

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[6] Petitioner's statement of the questions presented (Pet. i) appears to raise the issue of whether successorship can be

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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found when employment of the predecessor's employees is "forced" and "temporary" as a result of the government's failure to grant security clearances quickly. Petitioner does not argue that point in the body of the petition, and it raises at most a fact specific issue that does not warrant this Court's review. In any event, the Board, upheld by the court of appeals, found that petitioner never told the predecessor's employees that their employment was temporary, but instead treated them as permanent employees. Pet. App. 5a-6a. Accordingly, this case does not present any issue of forced temporary hiring.

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